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Supreme Court of the United States.

October Term, 1930.

No. 57.

Story Parchment Company

v.

The Paterson Parchment Paper Company and Kalamazoo Vegetable Parchment Company.

MEMORANDUM FOR PLAINTIFF-PETITIONER IN OPPOSITION TO DEFENDANTS'-RESPONDENTS' PETITION FOR REHEARING.

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STORY PARCHMENT COMPANY

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THE PATERSON PARCHMENT PAPER COMPANY AND KALAMAZOO VEGETABLE PARCHMENT COMPANY.

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The petition for rehearing is divided into two parts, the first directed to the proposition that "The Court has been led into a misapprehension as to the contents of the record," and the second devoted to an argument on four minor assignments of error not discussed in the defendants' original brief, but discussed in our reply brief, pages 57 to 59.

I.

This Court has Correctly Understood the Record.

The supposed misapprehension asserted was in believing that the Circuit Court of Appeals had decided that there was evidence of a conspiracy by the defendants to monopolize or to restrain trade.

Now, obviously, there was no misapprehension by this Court of the record. The opinion of the Circuit Court of Appeals upon that issue plainly states that there was such evidence. The Court of Appeals said:

> ". . . the plaintiff does not ground its action on a conspiracy to restrain trade under Sec. 1 of the Sherman Act, though the indirect effect of a monopoly is to restrain trade, but on a conspiracy to maintain a monopoly under Sec. 2.
>
> "On this issue, alone we think there was no error in the refusal of the Court to instruct the jury to bring in a verdict for the defendants. Without expressing any opinion as to the soundness of the jury's conclusion, there was sufficient evidence to go to the jury on the issue of a concerted action by the three old companies to fix their prices so as to prevent the plaintiff from acquiring any part of their trade" (R. 616).

It is only the last sentence quoted which defendants have regarded. Apparently, by fixing their attention upon those words to the exclusion of what went before, they have persuaded themselves that the Circuit Court of Appeals failed to decide that "concerted action by the three old companies to fix their prices so as to prevent the plaintiff from acquiring any part of their trade" was concerted action to monopolize or restrain trade, and that this Court so decided only inadvertently.

So it is said, on page 5 of the petition for rehearing:

> "If the case is to be disposed of on the findings of the Circuit Court of Appeals, in confirmation of those of the jury, the case presents the clear-cut issue of law, whether concerted action to fix prices so as to prevent competitors from acquiring existing trade and so as to retain that trade is, without more, unlawful conspiracy."

But if this Court decided that question inadvertently, it was not because the point was not brought to its attention by the defendants. Indeed, in their original brief, the extraordinary argument was made that—

> ". . . if prices have been maintained in concert, an agreement to lower them is not only not an agreement in restraint of trade but it is an agreement to remove an existing restraint of trade.
>
> "As matter of law, even had there been an agreement to reduce prices and a reduction of them pursuant thereto, it would not have been an agreement in restraint of trade, or a restraint of trade.
>
> . . . . . .
>
> "A combination to reduce prices is not a combination to restrain trade" (Defendants' Brief on Merits, pp. 12-13).

The defendants, of course, had an opportunity to make the same arguments before the Circuit Court of Appeals.

But, of course, it is settled that concerted action to fix prices is in restraint of trade, even though the prices fixed are reasonable.

> *United States* v. *Trenton Potteries Co.*, 273 U.S. 392.
>
> *Live Poultry Dealers' Protective Ass'n* v. *United States*, 4 Fed. (2d) 840, 842.

A fortiori, a combination to reduce prices to a level below cost, for the purpose of driving a newcomer out of trade, is one in restraint of trade.

The fact that the conspirators intend thereby to *retain their trade*, when they have a monopoly threatened by the competition of the newcomer, is hardly an excuse. Where those in the combination already occupy the whole field, a

purpose to retain what they have, necessarily comprehends a purpose to exclude all others and to monopolize.

Patterson v. *United States*, 222 Fed. 599, 622:

> "Now the offense of monopolizing consists not only in obtaining or securing, in the first instance, a monopoly by the wrongful acts of individuals, but in holding and maintaining it by such acts."

Standard Oil Co. v. *United States*, 221 U.S. 1, 61:

> "Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results."

But, while the defendants, on page 5 of the petition, define the issue as the legality of concerted action to fix prices so as to prevent competitors from acquiring trade, on page 7 they conclude that the opinion means—

> "that if a newcomer with knowledge that the old have uniform prices enters the field with cut prices, all the old may not reduce theirs at the same time, but must keep them up and let the new get their existing trade, or they will be guilty of attempting to monopolize."

This distortion of the *ratio decidendi* of the opinion has no justification. It excludes the fact of concerted action for an unlawful purpose, and assumes that the plaintiff entered the field with cut prices, a charge which the plaintiff denied, and which the jury must have found not to be true. See the Court's charge (R. 599):

> ". . . and especially if you find that it adopted a policy of underselling old established companies, why then the defendants cannot be held responsible."

We submit that any misunderstanding of the record and of the legal principles involved in the case is wholly on the defendants' part. We find none in the opinion of this Court.

II.

There was No Error in the Court's Disposition of the Fourth, Sixth, Seventh, and Eighth Assignments.

These assignments were examined by this Court and disposed of in its opinion, or determined to be not of sufficient substance or materiality to call for consideration (Opinion, last paragraph).

No argument was made upon them in the defendants' original brief. They are now resurrected for discussion in the petition for rehearing. We find such inaccuracy in the statements of what the record contains, and of the specific matters upon which the assignments are based, that we cannot refrain from replying.

Fourth Assignment (R. 607).

The argument made by the defendants upon the Fourth Assignment is based solely upon the proposition that—

> "There is nothing in the charge to advise the jury that there must be an element of causation from the combination to the diminution" (Petition for Rehearing, p. 10).

This is not true.

The trial Court instructed the jury:

> "The plaintiff cannot recover here unless you are satisfied that the defendants have done something forbidden by the anti-trust laws, and that, as the result of that forbidden act, or acts, the plaintiff has been injured in its business or property" (R. 598).

. . . . . .

". . . The second proposition which the plaintiff has got to establish is that the plaintiff's loss was directly attributable to this unlawful combination" (R. 598).

. . . . . .

"It is incumbent upon the plaintiff to prove each and every one of these three propositions, and if it fails to satisfy you by a fair preponderance of the evidence that there was a loss directly attributable to it, and unless it enables you to find damages in an amount which may be expressed in dollars and cents, then the plaintiff cannot recover. . . .

"The second proposition, or the second question in issue, is whether the acts of the defendants resulted in injury to the plaintiff. It is necessary, in a suit of this kind, for a party to go farther than the government would have to go if it were proceeding under the anti-trust law. The government would prevail by showing only an unlawful combination; but an individual, when he seeks to invoke the statute in question, has to add one step more,—he has to satisfy the jury that the losses which the plaintiff sustained were the direct result of the unlawful acts of the defendants. I take it that the unlawful acts, if they are found to be unlawful at all, were the acts of reducing prices. Nothing else seems to have been done that could work an injury to the plaintiff. So that you have to decide whether the plight in which the plaintiff company found itself at the time that it brought its suit was primarily and directly attributable to the price reduction. If you find that it was attributable to want of capital, to lack of experience, to inefficiency, or to the adoption of an unwise policy, and especially if you find that it adopted a policy of underselling old-established companies, why, then the defendants cannot be held responsible for that loss, because the loss cannot be attributed to the unlawful acts of the defendants" (R. 599).

Seventh Assignment (R. 608).

This was discussed in our reply brief, page 59.

The circumstances under which the question was asked and answered appear in the record at page 554.

Eighth Assignment (R. 608).

This was discussed in our reply brief, page 59.

The testimony objected to is at record pages 561 to 562. Respondents' counsel claim that the prejudice to them from Goldmann's testimony—

> ". . . was peculiarly grave, because the conversation was left unanswered. The plaintiff had taken Moyer's deposition in Ohio before the trial, and had introduced it in evidence at the trial. This testimony from Goldmann came several weeks after the beginning of the trial and when there was no opportunity for the defendants to cross-examine Moyer as to whether any such conversation had occurred."

This impresses us as insincere, inasmuch as two letters from Moyer had been annexed to the depositions taken before the trial (Exhibit P, 429, R. 444; and Exhibit W-96, R. 446), in both of which Moyer narrates the parts of the conversation now regarded as so prejudicial, substantially as stated by Goldmann in his testimony. Respondents' counsel, so apprised of the testimony when the depositions were taken, failed to cross-examine upon them.

We respectfully submit that the petition for rehearing should be denied.

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